86-1796

No. .....

In The
Supreme Court of the United States
October Term, 1986

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SEQUOIA BOOKS, INC.,
a corporation,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment prohibits the padlocking of a bookstore by an injunctive order on the basis of content of sexually explicit material sold therein.

2. Whether the First Amendment prohibits the padlocking of a bookstore by an injunctive order on the basis of an allegation of a single act of sexual conduct not tied to the business premises of the store in any manner.

3. Whether a civil common law nuisance action can be maintained consistent with the requirements of *Freedman v. Maryland* to seek a closure order of a bookstore.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

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Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on October 31, 1986.

—o—

[1] There are no parent companies, subsidiaries, or affiliates of the corporation.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at 149 Ill.App.3d 383, 500 N.E.2d 82 (1986). A copy of the opinion is included in the Appendix as Exhibit A.

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JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Appellate Court for the Second District. In all lower court proceedings, petitioner asserted claims based on the First and Fourteenth Amendments to the Constitution of the United States.

A written opinion was issued by the Appellate Court on October 31, 1986, and rehearing was not sought by petitioner. A petition for leave to appeal was filed with the Illinois Supreme Court, and on February 6, 1987, its petition was denied. A copy of the order denying leave to appeal is included in the Appendix as Exhibit B. Petitioner filed an affidavit of intent to seek review in the United States Supreme Court, and a motion to stay the mandate, with the Illinois Supreme Court. On February 19, 1987, its motion was granted, and a copy of the order of the Illinois Supreme Court staying the mandate is included in the Appendix as Exhibit C.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States, Ch. 38, §11-20, Ill.Rev.Stat. (the Illinois Obscenity Statute), and Ch. 100½, §1 *et seq.*, Ill.Rev.Stat. (the Public Nuisance Act) are set forth in the Appendix as Exhibits D, E, and F.

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STATEMENT OF THE CASE

On February 28, 1983, Kendall County, Illinois, authorities instituted a two-count criminal complaint against the petitioner herein, and against Bruce and Cathy Riemenschneider in the Circuit Court of the 16th Judicial Circuit of Kendall County, Illinois. (The Riemenschneiders were not parties to the appeal of this cause.) An amended two-count complaint was subsequently filed by the State. Under the first count, although not expressly stated as such, the State sought injunctive relief under a common law nuisance theory to prohibit the defendant from the continued sale of alleged obscene material. In the second count, injunctive relief to close the store for one year was sought through a public nuisance theory under Ch. 100½, §1 *et seq.*, although no statutory reference was specifically cited.

The complaint contained allegations that Sequoia operated the Denmark Bookstore, an establishment which sold communicative materials, such as movies, magazines and video tapes, that contained depictions of designated sexual conduct and were asserted to be obscene. The complaint further stated that Sequoia had continually offered

such material for sale since July of 1982, and that employees of the defendant's store had been charged with the criminal offense of obscenity.

By a stipulation and further amendments, the Kendall County Circuit Court, Judge Richard D. Larson, considered that the State had filed a total of 17 criminal cases from November of 1982 through January of 1984, and that none of the cases had been brought to trial. The stipulation further related that nine other cases were filed but no arrests had been effectuated. All of the pending cases involved alleged violations of the Illinois Obscenity Statute, Ch. 38, §11-20, Ill.Rev.Stat.

Under the purported common law nuisance count, the State asserted that the criminal law had not had any limiting effect on the activities of Sequoia, and that the continued sale and exhibition of material constituted a "menace to the public welfare of the residents of Kendall County." The complaint also alleged that no adequate remedy at law existed for the State, and irreparable injury would occur to the public if the activity was not enjoined.

Under the public nuisance theory, the complaint allegations closely paralleled violations of the Public Nuisance Act, Ch. 100½, §1 *et seq.*, Ill.Rev.Stat., and the State sought closure of the bookstore for a one-year period. It was asserted that Sequoia had permitted fellatio to occur on the bookstore premises and thus, by allowing such conduct, the building was being used for the purpose of lewdness and assignation.

Sequoia filed a motion to dismiss, alleging both pleading and substantive law defects in the complaint. The defendant Riemenschneiders did not file any appearance in

the case in the trial court and were not a party in the appeal.

As to Count I of the complaint, Sequoia contended there was a failure to state a cause of action. The defendant asserted there were not sufficient facts to show that adequate relief could not be obtained through criminal proceedings. It was further asserted that the injunctive relief sought was impermissible because it imposed a prior restraint, in violation of First Amendment principles of law, and additionally, the described conduct sought to be enjoined contravened principles pronounced in *Miller v. California*, 413 U.S. 15 (1973). Sequoia also contended no statutory or common law nuisance theory was recognized by Illinois case law to support the injunctive relief sought. Even assuming such relief was available, the defendant asserted insufficient facts were stated to show the required irreparable harm or injury to the public to warrant issuance of an injunction.

With respect to Count II, in its motion to dismiss Sequoia reasserted its claim that insufficient facts were contained to make the required showing that relief was not available through the criminal law and that the public would suffer irreparable harm and injury absent an injunction. The defendant also asserted no allegations were set forth that the asserted sexual conduct occurred within the business premises and that it was performed on a commercial basis.

The Kendall County trial court granted the defendant's motion to dismiss. A copy of the trial court's opinion is included in the Appendix to the petition as Exhibit G. While noting that the Illinois Supreme Court appeared to acknowledge a common law nuisance action under *City*

of Chicago v. Festival Theatre Corp., 91 Ill.2d 295, 438 N.E.2d 159 (1983), the trial court found the allegations relating to the charges and dispositions of the criminal cases were insufficient to meet the required showing that the criminal law was an inadequate remedy. Subsequent to this initial ruling by the court, a stipulation was presented to the court, detailing all pending cases and the status of each. The court, however, reaffirmed its prior holding after receiving and considering this additional information.

The trial court also agreed with the defendant's claims that the requested relief would constitute an invalid prior restraint, relying on the principles announced in *Vance v. Universal Amusements*, 445 U.S. 308 (1980) and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and the lack of the safeguards enunciated in those cases. The court also agreed that the description of the materials sought to be enjoined did not conform to *Miller* principles.

In rejecting the relief requested under the public nuisance theory, the trial court held that absent allegations that the asserted fellatio conduct on the premises was performed on a commercial basis, no injunction could be issued.

On October 31, 1986, the Second District Appellate Court for the State of Illinois reversed the trial court's ruling which granted the motion to dismiss of the defendant Sequoia. The court held that the purpose of a common law nuisance action was to offer a more complete remedy than that available through the criminal law. Relying on *City of Chicago v. Festival Theatre*, 91 Ill.2d 295, 438 N.E.2d 159 (1982), and *City of Chicago v. Cecola*, 75 Ill.2d 423, 389 N.E.2d 526 (1979), the court noted that where a

criminal prosecution cannot prevent continuation of a nuisance, an equity action may be pursued. The court concluded that the allegations of the complaint, when considered with the stipulation, were sufficient statements on the inadequacy of the criminal law to support a cause of action under a common law nuisance theory.

The Appellate Court further held that inclusion of the correct definitional elements of the offense of obscenity under *Miller v. California* was unnecessary and would simply be surplusage. The court concluded that any vagueness difficulty with the definition of obscenity under a common law nuisance action was cured by a restriction of the definition to that under the criminal statute, as judicially construed.

Although noting that the issue did not need to be addressed because no injunction was ever entered, the Appellate Court still found that such an injunction would not operate as a prior restraint. The court held such an injunction did no more than order the defendants not to violate the criminal laws against obscenity.

In addressing the sufficiency of the complaint under the public nuisance theory, the court determined that the alleged conduct of fellatio fell within the term "lewdness", which conduct is covered under the Public Nuisance Act. The court also expressed a contrary opinion to that reached in *People v. Goldman*, 7 Ill.App.3d 253, 287 N.E.2d 177 (1972), and held that commercialism did not need to be asserted or proved in seeking an injunction as to the conduct.

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REASONS FOR GRANTING THE WRIT

I.

THE ALLEGATIONS OF THE COMPLAINT UNDER A COMMON LAW NUISANCE THEORY AND THE RELIEF SOUGHT THEREIN DID NOT CONTAIN THE REQUIRED SPECIFICITY TO WITHSTAND A MOTION TO DISMISS BECAUSE:

(A) THE MATERIALS SOUGHT TO BE ENJOINED BY INJUNCTIVE RELIEF WERE NOT LIMITED BY THE PROSCRIPTION OF OBSCENE MATERIAL UNDER MILLER v. CALIFORNIA AND THE ILLINOIS OBSCENITY STATUTE.

(B) THERE WAS NO SHOWING THAT CRIMINAL PROSECTUTIONS WERE NOT AN ADEQUATE REMEDY.

This case presents significant recurring constitutional issues for this Court to address, where state and local governments are seeking to control regulation of the dissemination of sexually explicit material through the use of civil remedies. This Court has never addressed the use of a civil remedy to padlock a bookstore on the basis of the content of materials sold within. Based on the principles of cases of this Court, the petitioner submits that the methods employed by the State of Illinois in the instant proceeding violate its rights under the First and Fourteenth Amendments to the Constitution of the United States and the pronouncements of these controlling cases.

This Court has held that the protections of the First Amendment do not extend to obscenity, and that civil procedures, in addition to criminal sanctions, can be utilized to control the unprotected speech. See, *e.g., Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 55 (1973); *Kingsley Books*

v. Brown, 354 U.S. 436, 441 (1957). Important constitutional questions are called into play, however, where the allegations of the complaint contain blanket assertions that materials containing specified sexual conduct are obscene, and the relief sought extends to future distribution of unnamed sexually explicit material and results in the total ban of all communicative material.

(A)

Failure to Limit Obscenity Definition

In *Miller v. California,* 413 U.S. 15 (1973), this Court set forth the definition of obscene material to be utilized by the courts in determining whether material is protected or unprotected speech under the First Amendment. Subsequent to *Miller,* the Illinois Supreme Court engrafted the *Miller* requirements into the Illinois Obscenity Statute, still retaining, however, the utterly without redeeming social value element of *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), as the third element of the tripartite test. *People v. Ridens (Ridens II),* 59 Ill.2d 362, 321 N.E.2d 264 (1974).

Count I of the respondent's complaint in the present case contained allegations that certain depictions of conduct were *per se* obscene without regard to the content or pervasiveness of such sexual conduct. It is fundamental that certain constitutional requirements must be met for material to be held obscene, and that includes application of the correct standard to adjudge obscenity. The petitioner submits that a local official's assertion that certain conduct is "obscene" is not legally determinative and accordingly, cannot form a sufficient basis in a civil complaint that will permit issuance of an injunction to enjoin future dissemination of any materials containing certain described sexual content.

A determination of the obscenity of material is no different in a civil proceeding than in a criminal case, and the standards utilized in the latter instance must be incorporated into any attempts to regulate the dissemination of sexually explicit material through a civil remedy. The petitioner asserts that in its case these fundamental requirements were totally absent both in the allegations of the complaint and in the injunctive relief requested. The allegations and prayer of the complaint are completely void of any reference to the applicable criminal obscenity statute for the State of Illinois, and of any guidelines for adjudging obscenity as set forth by this Court in *Miller*.

This vagueness and overbreadth problem was totally ignored by the appellate court, and as a result, petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States have been violated.

(B)

Inadequacy of Criminal Law

Petitioner has asserted at all stages of this proceeding that its motion to dismiss should have been granted because there was no showing that criminal prosecutions were an inadequate remedy. In this case, there was a full and complete record before the court, including the stipulation between the parties as to the status of all pending criminal cases against petitioner or employees of its store. That record revealed that in not one instance had a final adjudication been made on the criminal offense of obscenity.

Whether the state or government can sustain an action under a common law nuisance theory and obtain injunctive relief is dependent upon a showing that it has no "adequate remedy at law". Such is a fundamental requirement of an

action in equity for injunctive relief. Here, the respondent State of Illinois had a burden of proof that enforcement of the criminal law would not bar the complained of activity. This requirement of ineffectiveness is even more compelling in a case involving communicative materials presumptively protected under the First Amendment to the Constitution of the United States.

An equity action is also not designed to authorize a shortcut for situations where multiple criminal actions exist. Respondent asserted in its complaint that a grant of injunctive relief would prevent multiplicity of criminal actions. Such a technique, however, flies in the face of basic constitutional rights given to defendants in criminal cases, and is contrary to public policy. The status of the law with regard to nuisance actions and adult bookstores was recently summarized in the *Attorney General's Commission on Pornography, Final Report, July 1986:*

> Nuisance laws, when applied to sexually explicit materials, are attempts to serve many of the interests that generated the zoning approach, but here the aim is prohibition rather than relocation. The desired result in most such legal actions is an injunction against further operation of the establishment. For that reason, all effective uses of this approach have thus far been found unconstitutional. Even where an establishment has been found guilty of a criminal obscenity violation, the law as of this moment does not permit the finding of obscenity with respect to one magazine, or one film, to justify what is in fact a restriction on other films and other magazines not yet determined to be legally obscene, and therefore presumptively protected by the First Amendment.
>
> *Attorney General's Commission on Pornography,* p. 391.

The extraordinary remedy of injunction is not a substitute for a criminal code, and the respondent in this case was attempting to shortcircuit the criminal justice system. As Justice O'Connor recently stated in her concurring opinion in *Arcara v. Cloud Books*, — U.S. —, 106 S.Ct. 3172 (1986):

> If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.
>
> — U.S. —, 106 S.Ct. at 3178 (O'Connor, J. concurring, 1986)

The complaint in this case was solely designed to bypass criminal law remedies, and to totally suppress all communicative activity at petitioner's bookstore, the very situation anticipated by Justice O'Connor in *Arcara*. Under these circumstances, application of the principles of *United States v. O'Brien*, 391 U.S. 367 (1968), was called for. Applying those precepts, the cause of action advanced by the complaint improperly seeks to regulate on the basis of content of communicative materials and is not the least restrictive means.

A common law nuisance action cannot withstand a motion to dismiss on facts as exist in the instant case. This

case presents a significant opportunity for the Court to address a questioned common law cause of action where a clear violation of petitioner's First Amendment rights has occurred.

II.

THERE WAS NO PUBLIC NUISANCE STATUTORY CAUSE OF ACTION, GIVEN THE ALLEGATIONS OF THE COMPLAINT.

The complaint in this case was construed under Count II as a statutory based cause of action under the Illinois Public Nuisance Act, ch. 100½, §1 *et seq.*, Ill.Rev.Stat. Because a violation of the Illinois Obscenity Statute, ch. 38, §11-20, Ill.Rev.Stat. was not a predicate offense under the statute, to obtain relief under the statute, specifically a padlocking and closure of the bookstore premises, the respondent had to be creative.

The respondent asserted that the conduct of fellatio had been permitted to occur on the premises, but also alleged that communicative items that were obscene were being sold at the business. Respondent thus attempted to show that activities occurring at the location fell within the purview of the statute. The sole support of a cause of action, however, was a bald conclusory statement that the petitioner was permitting fellatio.

This Court has recently had an opportunity to deal with the propriety of an injunction which would allow the closure of an adult bookstore under a New York Public Health Law. In *Arcara v. Cloud Books, Inc.*, — U.S. —, 106 S.Ct. 3172 (1986), the complaint was based on the results of an undercover investigation. A deputy sheriff had personally observed instances of illicit sexual activities occurring on the premises of the bookstore. The officer

observed instances of solicitation of prostitution, and he himself had been solicited on at least four occasions by individuals who would perform sex acts in exchange for money.

The provisions of the New York Public Health Law and the Illinois Public Nuisance Act are virtually identical in defining the maintenance of a nuisance as one using a building or other place for "the purpose of lewdness, assignation or prostitution". Both statutes authorize a one-year closure if a nuisance is found to exist.

In *Arcara*, it was clear the asserted conduct fell within the "prostitution" aspect of the statute. In the instant case, however, the alleged act does not clearly fall within the statutory proscription. There was no assertion in the complaint that the act occurred in exchange for money or other value, and no assertion of continuing conduct or presently occurring conduct. The appellate court attempted to bring the conduct within the meaning of "assignation" by finding that the conduct occurred on premises primarily open for the sale of adult reading material. The petitioner submits there is absolutely no basis for such an equation.

Petitioner submits that a statutory public nuisance cause of action can only exist where there is a showing of a pattern of unlawful conduct, sexual in nature, and occurring on business premises in violation of a criminal statute. Under the facts of the present case, with a sole conclusory allegation that the conduct occurred, such an action cannot stand. To allow such a deficiency contravenes the principles set forth by *Arcara*. Because of the obvious potential for First Amendment concerns in this bookstore setting, such "thin pleading" and tenuous causes cannot be permitted. This Court should grant *certiorari* to address this significant issue.

III.

THE INJUNCTIVE RELIEF SOUGHT UNDER THE COMPLAINT VIOLATED THE PETITIONER'S RIGHTS UNDER THE FIRST AMENDMENT AND THE PRINCIPLES OF FREEDMAN v. MARYLAND, BY THE IMPOSITION OF A PRIOR RESTRAINT.

This Court has addressed the question of prior restraints on a number of occasions, and has expressed a great concern about interference of injunctive relief on future activities that are presumptively protected by the First Amendment to the Constitution of the United States. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), this presumption was couched in strong terms by the Court:

> The presumption against prior restraints is heavier —and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law; a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all other beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.
>
> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at p. 559.

See also, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

Prior restraints of varying forms have been condemned in various ways by this Court and lower federal courts. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S.

526 (1975), (denial of license); *Vance v. Universal Amusements,* 445 U.S. 308 (1980) (injunction prohibiting exhibition of motion picture film); *Schrad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981) (application of zoning ordinance resulting in elimination of adult bookstore locations). See also, *Genusa v. City of Peoria,* 619 F.2d 1203 (7th Cir. 1980); *Alexander v. City of Minneapolis,* 698 F.2d 936 (8th Cir. 1983); *Adultworld Bookstore v. City of Fresno,* 758 F.2d 1348 (9th Cir. 1985); *City of Paducah v. Investment Entertainment,* 791 F.2d 473 (6th Cir. 1986).

The respondent sought injunctive relief in the present case in two forms, both of which would result in the imposition of a prior restraint against petitioner's continued sale and exhibition of protected communicative materials. Under Count I, injunctive relief was requested against certain described sexual content, and under Count II the actual closure of the bookstore premises was sought.

The petitioner submits that it has an absolute right to sell or exhibit communicative material that are sexual in nature so long as the same are not judicially declared to be obscene. *Miller v. California,* 413 U.S. 15 (1973); *Jenkins v. Georgia,* 418 U.S. 153 (1974). The use of an injunction to bar the operation of the business or declare it a nuisance resulting in the prohibition of protected material is an invalid prior restraint. That the business has even been the locus of activity resulting in a prior criminal obscenity conviction is of no moment. Numerous state and federal courts have held that such blanket injunctions are unconstitutional. *Spokane Arcades, Inc. v. Brockett,* 631 F.2d 135 (9th Cir. 1980); *Universal Amusements v. Vance,* 587 F.2d 159 (5th Cir. 1978), aff'd. on other grounds, 445 U.S. 308 (1980); *People ex rel Busch v. Projection Room,* 550 P.2d 600 (Cal. 1976); *Sanders v. State,* 203 S.E.2d 153 (Ga.

1974); *General Corporation v. State ex rel Sweeton,* 320 So.2d 668 (Ala. 1975); *State v. A Motion Picture Entitled the Bet,* 547 P.2d 760 (Kan. 1976); *Gulf State Theater v. Richardson,* 287 So.2d 480 (La. 1973); *Mitchem v. State ex rel Schaub,* 250 So.2d 883 (Fla. 1971); *Commonwealth v. McDonald,* 347 A.2d 290 (Pa. 1975).

The Court has set forth certain procedural requirements that must be met for a system of prior restraint to be constitutional. In *Freedman v. Maryland,* 380 U.S. 51 (1965), the Court identified the standards to be:

> (1) A placement of the burden of proof on the censoring authority that the material is unprotected;
>
> (2) Judicial participation and a limitation to preserving the status quo in any restraint prior to final judicial determination;
>
> (3) A specified time period for seeking approval of the exhibition of judicial review, with a prompt and final judicial determination.

The requested relief under the respondent's complaint did not meet the procedural safeguards of *Freedman.* The instant case is no different than the situation reviewed and approved by this Court in *Vance v. Universal Amusements,* 445 U.S. 308 (1980), where the *Freedman* requirements were not present. Under the closure order requested, there is no burden at all imposed on the censor to show that the material being suppressed is unprotected, and instead, there is a *per se* presumption of obscenity of all materials, a clear violation of *Freedman's* first requirement.

The petitioner submits that its constitutional rights under the First Amendment to the Constitution of the United States, and the principles of this Court in cases addressing systems of prior restraints, have been ignored by

the appellate court holding in this case. This Court should grant *certiorari* to address this constitutional deprivation of significant magnitude.

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CONCLUSION

This Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, because of the significant issues involved. This case presents an opportunity for this Court to address an important constitutional issue affecting not only the petitioner, but others involved in the sale and distribution of communicative material presumptively protected by the First Amendment to the Constitution of the United States.

Respectfully submitted,

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May, 1987

APPENDIX

EXHIBIT A

No. 84-428

In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

SEQUOIA BOOKS, INC., BRUCE RIEMENSCHNEIDER and CATHY RIEMENSCHNEIDER,

Defendants-Appellees.

Appeal from the Circuit Court for the 16th Judicial Circuit,
Kendall County, Illinois

Honorable Richard D. Larson, Judge Presiding.

(Filed Oct. 31, 1986)

JUSTICE STROUSE delivered the opinion of the court:

On February 28, 1983, the State filed a complaint against the defendants, Sequoia Books, Inc. (Sequoia) and Bruce and Cathy Riemenschneider, seeking an injunction to prohibit the continued sale of allegedly obscene materials and to close Sequoia's adult bookstore for one year. Sequoia's motion to dismiss the complaint was granted by the trial court.

On June 27, 1983, the State filed a two-count amended complaint against Sequoia, alleged operator of an adult bookstore known as Denmark Bookstore, and Bruce and Cathy Riemenschneider, owners and lessors of the property upon which the bookstore is located. Count I is premised upon common law nuisance grounds. Count II alleges violations which closely parallel section 1 *et seq.* of "An Act regarding places used for purposes of lewdness, assignation, or prostitution, to declare the same to be public nuisances, and to provide for the more effectual suppression thereof." (Ill.Rev.Stat. 1981, ch. 100 ½, par. 1 *et seq.*) Although the statute was not cited within the complaint, the parties pleaded and argued this count as if it were.

Count I sought to enjoin the defendants from the exhibition, sale or offering for sale of allegedly obscene movies, video tapes, books or magazines. Count II sought to enjoin the defendants from operating Denmark Bookstore for one year because defendants allegedly permitted fellatio to occur within the business premises. On July 19, 1983, Sequoia filed a motion to dismiss alleging the complaint failed to state a cause of action because defects existed in both counts. The Riemenschneiders did not join in the motion to dismiss nor did they file an appearance. On March 22, 1984, the trial court entered an order dismissing the complaint on the following grounds: (1) the description of the articles sought to be enjoined did not conform with the principles expressed in *Miller v. California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607; (2) the complaint sought relief which would constitute an invalid prior restraint of the defendants' first amendment rights; (3) the complaint did not allege reasons

why criminal prosecution is an inadequate remedy; and (4) there was no allegation that the conduct alleged in count II was performed on a commercial basis.

Thereafter, on April 11, 1984, the State and Sequoia, by stipulation, amended paragraph six of count I to include a listing of the criminal actions filed against Sequoia and its employees. The trial court allowed the amendment to paragraph six and reaffirmed its prior dismissal of the amended complaint. The State claims on appeal that the trial court erred in dismissing the complaint because: (a) the complaint, which alleges a common law nuisance, need not allege the definitional elements of the term "obscene" as expressed in *Miller v. California;* (b) a grant of injunctive relief for a common law nuisance would not constitute an invalid prior restraint; (c) the complaint sufficiently alleges that the criminal law is an inadequate remedy to prevent continuance of a common law nuisance; and (d) statutory public nuisance proceedings may be allowed where the complaint alleges that the defendants permitted fellatio within the bookstore.

Initially, it is important to keep in mind the purpose and scope of the well-settled principles of law that control the dismissal of a complaint for failure to state a cause of action. A motion to dismiss admits for purposes of review such facts as are well-pleaded; it does not admit conclusions of law, the pleader's construction of a statute, or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest. A complaint should not be dismissed unless it clearly appears that no set of facts could be proved under the pleadings which

would entitle the pleader to relief. (*Cain v. American National Bank & Trust Co.* (1975), 26 Ill.App.3d 574, 578-79.) An appeal from an order dismissing such a motion preserves for review only a question of law as to the complaint's legal sufficiency. (*Gregor v. Kleiser* (1982), 111 Ill.App.3d 333, 334.) The factual allegations of a complaint are assumed to be true. *Collier v. Wagner Castings Co.* (1980), 81 Ill.2d 229, 232.

The first contention raised under the State's assignment of error is that count I need not allege the definitional elements of the term "obscene" in order to be legally sufficient. Specifically, the State asserts that the complaint's allegation in count I, paragraph 5 that "the aforedescribed depictions are obscene" satisfies pleading requirements for common law nuisance when considered with the detailed description of the acts in paragraph 4, and thus a detailed recitation in the pleadings of the definition of "obscene" is unnecessary. Defendant argues that the complaint's dismissal was proper because the complaint failed to allege the three-part test enunciated in *Miller v. California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607.

Depictions of sexual activity may be considered "obscene" when those depictions meet the following three requirements:

> "(a) * * * 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) * * * the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) * * * the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California* (1973), 413 U.S. 15, 24, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607, 2615; see also *Ward v. Illinois* (1977), 431 U.S. 767, 768-69, 52 L.Ed.2d 738, 743, 97 S.Ct. 2085, 2087; *People v. Ward* (1976), 63 Ill.2d 437, 439-40; *People v. Ridens* (1974), 59 Ill.2d 362, 366-67.

We do not agree that the common law nuisance count is defective by its failure to allege the definitional elements of obscenity. We have previously held that such definitional language constitutes surplusage as the Illinois obscenity statute, itself, defines the meaning of obscenity. (*People v. Bailey* (1984), 125 Ill.App.3d 346, 348-49.) Although *Bailey* involved the dismissal of a complaint charging the accused with the offense of obscenity pursuant to section 11-20(a)(1) of the Criminal Code of 1961 (Ill.Rev. Stat. 1981, ch. 38, par. 11-20(a)(1), and the complaint herein charged the defendants with common law nuisance violations, the distinction does not mandate another result in the present case. Moreover, our supreme court has held that the vagueness difficulty of obscenity in a common law nuisance action is to be restricted to the definition of obscenity in the criminal obscenity statute as judicially construed, which has been recognized as satisfying constitutional requirements. *City of Chicago v. Festival Theatre Corp.* (1982), 91 Ill.2d 295, 306-07; see also *People v. Ridens* (1974), 59 Ill.2d 362.

The State next claims that the trial judge erred by finding the injunction prayed for would operate as a prior restraint. In this case an injunction was never entered, and we, therefore, need not consider the question of prior restraint.

We note, however, that freedom of speech and press from prior restraint is not absolutely unlimited. (See, *e.g., Kingsley Books, Inc. v. Brown* (1957), 354 U.S. 436, 441, 1 L.Ed.2d 1469, 1474, 77 S.Ct. 1325, 1328; *City of Chicago v. Festival Theatre Corp.* (1982), 91 Ill.2d 295, 311.) There are legitimate State interests at stake in "stemming the tide of commercialized obscenity" including the interest of the public in the quality of life, the total community environment, the tone of commerce in city centers, and perhaps public safety itself. *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 49, 57-58, 37 L.Ed.2d 446, 457, 93 S.Ct. 2628, 2635.

In *Kingsley,* the Supreme Court upheld a New York statute authorizing the chief executive or legal officer of the municipality to maintain an action for an injunction against the sale and distribution of any written or printed matter of an indecent character. Comparing the statute which provided for an injunction to a criminal statute, the Court found that rather than subjecting the book seller to fear that the offer for sale of a book may, without warning, warrant criminal prosecution with the hazard of imprisonment, a civil procedure assures that such consequences will not occur unless the issued injunction is ignored. (354 U.S. 436, 442, 1 L.Ed.2d 1469, 1474-75, 77 S.Ct. 1325, 1328.) The court concluded that the injunction procedure provided a less restrictive and narrower restraint. 354 U.S. 436, 444, 1 L.Ed.2d 1469, 1475-76, 77 S.Ct. 1325, 1329.

In *Vance v. Universal Amusement Co., Inc.* (1980), 445 U.S. 308, 63 L.Ed.2d 413, 100 S.Ct. 1156, the Supreme Court held that a Texas nuisance statute, when coupled

with a Texas Rule of Civil Procedure, authorized prior restraints of indefinite duration on the exhibition of motion pictures that had not been adjudicated to be obscene. The Court stated that an exhibitor would be required to obey such an order pending review of its merits and would be subjected to contempt proceedings even if the film was ultimately found to be nonobscene. Such prior restraints, in the Court's opinion, would be more onerous and objectionable than the threat of criminal sanctions after a film has been shown, since nonobscenity would be a defense to any criminal prosecution. (445 U.S. 308, 316, 63 L.Ed.2d 413, 420-21, 100 S.Ct. 1156, 1161-62.) The Court, however, did not find that an injunction in the nature of a prior restraint was always prohibited. (See 445 U.S. 308, 317, 63 L.Ed.2d 413, 421, 100 S.Ct. 1156, 1162, and 445 U.S. 308, 321, 63 L.Ed.2d 413, 424, 100 S.Ct. 1156, 1164 (White, J., dissenting).) Here, nonobscenity would be a complete defense to contempt, and the procedural deficiency lacking in the Texas statute would not occur.

The Illinois Supreme Court held that an injunction issued by the trial court which restrained the defendants from presenting obscene live exhibitions did not present a problem of prior restraint. (*City of Chicago v. Festival Theatre Corp.* (1982), 91 Ill.2d 295, 311.) The court stated that, considering the evidence presented in the trial court, the applicable State statutes to which the trial court referred in its injunction order obviously are the obscenity provisions of the Criminal Code; the injunction does no more than order the defendants not to violate the laws against obscenity. The court continued: "Unlike the

order in *Vance,* the defendants here could not be held in contempt unless it were shown that they staged a performance that was obscene. In short, the order did not touch protected expression. Any effect it could have produced relating to the first amendment was no greater than that produced by the obscenity provisions of the Criminal Code." 91 Ill.2d 295, 311.

The State next maintains that the complaint sufficiently alleges that the criminal law is an inadequate remedy to prevent continuance of a common law nuisance. Specifically, the State asserts that the criminal law is ineffective in this case because: (1) many criminal charges have been brought against Sequoia's employees, including several instances of repeated charges against the same employee; (2) nine of the charges filed have not resulted in the arrest of named defendants; and (3) 10 of the charges were dismissed by the trial court and were pending on appeal when the complaint was dismissed. Those 10 were later reversed and remanded for further proceedings by this court in *People v. Bailey* (1984), 125 Ill.App.3d 346.

It is a principle of equity that an injunction will not issue except where there is no adequate remedy of law. (*City of Chicago v. Festival Theatre Corp.* (1982), 91 Ill.2d 295, 312.) Although the criminality of the conduct is a relevant factor in determining whether an injunction should issue, the purpose of giving equity jurisdiction in a common law nuisance action is to offer remedies more complete than those available at law. (91 Ill.2d 295, 313.) Equitable jurisdiction to abate public nuisances is said to be of "ancient origin," existing even where not conferred

by statute, where the offender is amenable to the criminal law, and where no property rights are involved. (*City of Chicago v. Festival Theater Corp.* (1982), 91 Ill.2d 295, 303.) Obscenity is not a form of expression protected by the first amendment and, therefore, may be regulated. (91 Ill.2d 295, 305.) Civil injunctive procedures constitute permissible means for regulating obscenity. (91 Ill.2d 295, 305.) To consider a criminal remedy to be adequate, the remedy "must be clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill.2d 540, 549, citing *K.F.K. Corp. v. American Continental Homes, Inc.* (1975), 31 Ill.App.3d 1017, 1021.

The Illinois Supreme Court has recognized that the criminal law can be ineffective in preventing the continuance of a nuisance. (*City of Chicago v. Cecola* (1979), 75 Ill.2d 423) (maximum fine of $200 insufficient to deter defendants from maintaining establishments offering sexual massage); *Village of Spillertown v. Prewitt* (1961), 21 Ill.2d 228 (defendant, having been arrested twice, claimed before village board he would continue strip-mining despite imposition of fines under ordinance); *People ex rel. Kerner v. Huls* (1934), 355 Ill. 412 (criminal prosecution inadequate remedy where defendant's statements showed he would pay statutory penalties but still not submit his cattle for tuberculin tests); *People ex rel. Dyer v. Clark* (1915), 268 Ill. 156 (numerous criminal convictions of keeper of brothel did not deter defendant from continuing the activity).) Further, when a criminal prosecution cannot prevent the continuance of a nuisance, an action in equity may be pursued to prevent the harm caused. *City*

of Chicago v. Geraci (1975), 30 Ill.App.3d 699 (where the criminal code did not effectively prevent the nuisance of masturbatory practices, the trial court did not abuse its discretion in issuing an injunction to close defendant's massage and bath enterprise); *City of Chicago v. Larson* (1961), 31 Ill.App.2d 450 (injunction barring defendants from interfering with the inspection of a building alleged to have been in violation of health and safety codes was upheld where the act complained of constituted a menace to the public health, safety or welfare, and where the enforcement of the criminal law was merely incidental to the relief sought).

In *City of Chicago v. Festival Theater Corp.* (1982), 91 Ill.2d 295, the supreme court held that an injunction which barred live obscene stage shows as common law nuisances must be reversed where it was not shown that criminal prosecution was an inadequate remedy for the harm caused. (91 Ill.2d 295, 313.) The allegations that the defendants presented an allegedly obscene performance despite two previous arrests for similar performances within 60 days were insufficient factors to persuade the court to conclude that the legal remedy was inadequate. (91 Ill.2d 295, 314.) The court found that the injunction issued within a few months of the first arrest and before criminal actions were completed was premature. (91 Ill.2d 295, 315.) The court also found it significant that the city of Chicago did not contend that the conviction and imposition of penalties available under the criminal obscenity law would be ineffective to deter defendants' activities or that this was a case where there was a risk to public health requiring expedited action. (91 Ill.2d 295, 315.) The court ruled that although a common law nuisance action may

hereafter be maintained against the defendants, at that time, the evidence did not disclose that criminal prosecution would be an inadequate remedy. 91 Ill.2d 295, 315.

In the present case, the trial court ruled that the allegations in paragraphs 6 and 8 of the complaint were insufficient because they did "not recite the disposition of the [criminal] charges." However, after the trial court submitted its written order, count I, paragraph 6 of the complaint was amended by stipulation of the parties and with the court's approval. The stipulation states that the Kendall County State's Attorney's office had filed criminal charges in 10 cases for violations of Sequoia's premises which were dismissed by the trial court. All 10 of these cases were reversed and remanded on appeal. There are nine cases pending on motions of various kinds and seven pending where no arrests have been made. These 26 pending cases spanned the period from November 24, 1982, to January 23, 1984. In addition, count I contains other references relevant to the issue of whether the criminal law is an inadequate remedy. The allegations of paragraphs 6 through 12 state:

> "6. That several employees of the defendant Sequois [*sic*] Books, Inc. have been charged with criminal offenses for exhibition, selling or offering for sale of said materials.
>
> 7. That the exhibition, sale and offering for sale has continued by the defendant, Sequoia Books, Inc. since July, 1982.
>
> 8. That the criminal law has not had any limiting effect upon said exhibition, sales or offering for sale.
>
> 9. That the continued exhibition * * * constitutes a menace to the public welfare of the residents of Kendall County.

10. That irreparable injury will occur to the public of County of Kendall unless said exhibition, sales and offering for sale is enjoined.

11. That no adequate remedy at law exists for the People of the State.

12. That an injunction issued in these proceedings, will prevent multiplicity of criminal actions."

The injunction requested in the prayer for relief is a more expansive remedy than the criminal penalties aimed at curbing obscenity under section 11-20 of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 11-20). We find that the allegations of the complaint, as amended, are a sufficient statement of the inadequacy of the criminal law to require a hearing. "[W]here the enforcement of the criminal law is merely incidental to the general relief sought and the acts complained against constitute a nuisance or danger to the public health and public welfare and a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity will * * * grant the relief sought by injunction." *City of Chicago v. Larson* (1961), 31 Ill.App.2d 450, 455, citing *People v. Huls* (1934), 355 Ill.412, 417.

The final issue concerns the sufficiency of count II which alleges that Sequoia permitted fellatio to occur on the bookstore premises. While no statute is pleaded, the parties and the court treated the complaint as being brought under section 1 *et seq.* of "An Act regarding places used for purposes of lewdness, assignation, or prostitution * * * ." Ill.Rev.Stat.1981, ch. 100 1/2,par.1 *et seq.* (The Public Nuisance Act).

Sequoia argues that the complaint was properly dismissed because the allegations do not state a cause of action for statutory public nuisance pursuant to the Act.

To establish such a cause of action, Sequoia maintains the facts in the complaint must demonstrate the adult bookstore is presently being used "for purposes of lewdness, assignation, or prostitution." Sequoia further contends that the State's sole allegation that fellatio is permitted to occur is insufficient to declare the premises a public nuisance. Sequoia believes, without citation of authority, that in order to state a cause of action under the Act the complaint must allege: (1) who the participants are; (2) what consideration is involved; (3) where the activity occurs within the adult bookstore; (4) the number of occasions it occurred; and (5) whether the activity is presently occurring.

The trial court ruled that an injunction, as provided in the Act, would not be proper because the complaint did not clearly allege whether the fellatio was performed on a commercial basis.

Section 1 of the Act provides:

> "That all buildings and apartments, and all places, and the fixtures and moveable contents thereof, used for purposes of lewdness, assignation, or prostitution, are hereby declared to be public nuisances, and may be abated as hereinafter provided. The owners, agents, and occupants of any such building or apartment, or of any such place shall be deemed guilty of maintaining a public nuisance, and may be enjoined as hereinafter provided." (Ill.Rev.Stat. 1981, ch. 100 1/2, par. 1.)

The Act further provides that the State's Attorney of the county in which the nuisance exists may bring a suit "perpetually to enjoin all persons from maintaining or permitting such nuisance," and to enjoin the use of a building for any purpose for a period of one year. (Ill.Rev. Stat. 1981, ch. 100 1/2, par. 2.) The Act requires a veri-

fied petition, and, if a judge is satisfied that a nuisance exists, a temporary injunction may be issued pending a hearing on a permanent injunction. Ill.Rev.Stat. 1981, ch. 100 1/2, par. 2.

Our first inquiry, therefore, must be whether the alleged conduct, fellatio, is covered by the Act under the terms lewdness, assignation or prostitution. Prostitution is defined as deviate sexual conduct for money in section 11-14 of the Criminal Code of 1961 (Ill.Rev.Stat. 1981, ch. 38, par. 11-14). Clearly, fellatio is the type of conduct that also is considered to be deviate sexual conduct covered by the Code. (See Ill.Rev.Stat. 1981, ch. 38, pars. 11-2, 11-9.) As stated, the term prostitution, defined by the Code, must be for money. Here, there is no allegation of value, and, therefore, the alleged act cannot be covered under the term prostitution. It remains to be determined whether the Act proscribes the alleged conduct if it is not of a commercial nature.

Webster's Third New International Dictionary 132 (1971) defines assignation as "an appointment of time and place * * * esp. for illicit sexual relations * * *." It is the use of premises regardless of whether there is commercialized vice. (*Rhodes v. State* (1945), 208 Ark. 1043, 189 S.W. 2d 379, 381.) In the context of literature and history, assignation is a thing apart from statutory prostitution. (*People v. Goldman* (1972), 7 Ill. App. 3d 253, 256 (Trapp, J., dissenting).) The use of the word assignation, alone in the complaint, is not sufficient to plead this portion of the Act where there are no other allegations of fact to support that assignations have taken place on the premises.

Webster's Third New International Dictionary 1301 (1971) defines lewd as "BASE, EVIL, WICKED—used

of persons and their conduct * * * [S]exually unchaste or licentious: DISSOLUTE, LASCIVIOUS: [S]uggestive of or tending to moral looseness * * * INDECENT, OBSCENE, SALACIOUS * * * " (See also Black's Law Dictionary 1052 (4th ed. 1968).) We hold that permitting acts of fellatio on premises which are primarily open to the public for the sale of adult reading materials is 'the use of the premises for lewdness'' under the Act. Remaining is the question of whether the conduct must be for a thing of value.

Other states have endorsed enjoining improper acts pursuant to similar public nuisance statutes despite the absence of a showing that the acts were conducted on a commercial basis. In a case similar to the one herein, a virtually identical New York statute was applied to an adult bookstore which permitted patrons to commit lewd and illegal acts on the premises without a showing or allegation of the commercial aspect of the acts. (*People ex rel. Arcara v. Cloud Books, Inc.* (1984), 101 A.D.2d 163, 475 N.Y.S.2d 173, *rev'd on other grounds* (1985), 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307, *rev'd* (1986), — U.S. —, 92 L. Ed. 2d 568, 106 S. Ct. 3172.) The court stated:

> "While there is little precedent in New York for applying the Public Health Law to premises other than a house of prostitution [Citations], similar statutes in three other states have been broadly construed to be applicable to various premises other than houses of prostitution. In *State ex rel. Carroll v. Gatter*, 43 Wash.2d 153, 160, 260 P.2d 360, the Supreme Court of Washington discussed the general applicability of its red light abatement statute:
>
> * * *
>
> In *State ex rel. Wayne County Prosecuting Attorney v. Levenburg*, 406 Mich. 455, 280 N.W.2d 810, the Su-

preme Court of Michigan held that proof of numerous instances of accosting and soliciting for purposes of prostitution at a bar was sufficient to sustain a finding that the bar constituted a nuisance under Michigan's abatement act and was, hence, subject to abatement." 475 N.Y.S.2d 173, 177.

In finding that the State had stated a cause of action pursuant to the statute, the court further remarked:

> "The question of whether any given premises, including defendant's bookstore, is subject to title II of article 23 of the Public Health Law is necessarily a question of fact. Resolution of this question will depend upon the degree of illicit activity which plaintiff can prove occurred at the store.
>
> * * *
>
> While it will not be necessary for the People to demonstrate that the sole, or even dominant, use of the premises is devoted to the illegality prohibited in the statute, the People will have to show a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use." 475 N.Y.S.2d 173, 178.

And, the Supreme Court of Washington stated:

> "The statute is not directed to the abatement of commercial eroticism—that is governed by the criminal statutes. It is directed to the abatement of premises which, by reason of sufficient happenings therein, have absorbed and taken the character of the acts committed, and have in fact become houses of lewdness, assignation or prostitution.
>
> But, the operator of such premises cannot escape the force of the abatement statute by calling the premises a "hotel", "apartment", "club", or giving it any name which purports to identify it as a place of lawful and legitimate business; nor can certain immunity be gained by showing mathematically that the principal business of the establishment is legitimate." *State ex re. Carroll v. Gatter* (1953), 43 Wash. 2d 153, 260 P.2d 360, 364.

In *State ex rel. Wayne County Prosecuting Attorney v. Levenburg* (1979) 406 Mich. 455, 280 N.W.2d 810, the Supreme Court of Michigan construed the word "assignation" to justify closing a tavern which permitted prostitutes to accost and solicit customers on the premises.

> "The difficulty in interpreting the meaning of the statutory phrase, 'lewdness, assignation or prostitution' as used in this act, and determining its applicability to the facts before us, stems from dictum in *Diversified* which states that this statute '* * * was intended to apply to houses of prostitution * * *' and that lewdness and assignation are both synonymous with prostitution. We do not accept this dictum as controlling these cases." (280 N.W.2d 810, 811.)

See also *People v. The Adult World Bookstore* (1980), 108 Cal.App.3d 404, 410, 166 Cal.Rptr. 519, 523.

Other Illinois appellate courts have held that the Public Nuisance Act is aimed at prostitution, not obscenity, and that it must be of a commercial nature. (*People v. Movies, Inc.* (1971), 49 Ill.2d 85, 87 (in *dictum*); *People ex rel. Difanis v. Futia* (1978), 56 Ill.App.3d 920, 926; *People v. Goldman* (1972), 7 Ill.App.3d 253, 255.) In *Goldman*, the majority found the words lewdness and assignation were, by the principle of *noscitur a sociis*, synonymous with prostitution. (7 Ill.App.3d 253, 255.) In *City of Chicago v. Geraci* (1975), 30 Ill.App.3d 699, 704, "lewdness" had a broader meaning than "prostitution," but when considered together it meant sexual acts performed for money.

The meaning of lewdness, assignation or prostitution, however, is not restricted to its definition under the criminal code, when either common law or public nuisance is concerned. (*City of Chicago v. Festival Theatre Corp.* (1982), 91 Ill.2d 295, 303; *City of Chicago v. Cecola* (1979),

75 Ill.2d 423, 428.) Moreover, our supreme court has not drawn such a narrow interpretation of the Act. In *Festival,* a case involving live commercial sex acts, the court concluded that such stage shows may be abated as common law public nuisances and that the definition used in *Goldman* may be too restrictive. 91 Ill.2d 295, 301-303.

We believe that the words of the statute should be given their common meaning and that commercialism need not be alleged or proved to enjoin the lewd public behavior of fellatio in a commercial establishment as is alleged here. To hold otherwise, in our opinion, would be to abandon the plain meaning of the words of the statute. There is nothing in the Act which indicates that it applies only to commercial prostitution. "The plain language of the statute announces three categories of nuisance, *i.e.*, the lewd or obscene designed to incite lust or depravity albeit without necessarily immediate contemporaneous instant sexual acts; assignation in the sense of illicit sex relations albeit without 'acts for money', and finally the statutory prostitution." *People v. Goldman* (1972), 7 Ill.App.3d 253, 256 (Trapp, J., dissenting).

The grant or denial of a motion to dismiss is generally within the sound discretion of the trial court; however, a motion to dismiss should not be granted if a good cause of action is stated. (*City of North Chicago v. North Chicago News, Inc.* (1982), 106 Ill.App.3d 587, 594.) In considering a motion to dismiss, the complaint must be considered as a whole and allegations should neither be stricken nor the complaint dismissed for failure to state a cause of action, unless it clearly appears that no set of facts could be proved under the pleadings which would entitle the plaintiff to relief. (106 Ill.App.3d 587, 594.) We hold that count II states a cause of action upon which relief may be

granted as provided in section 2 of the Act (Ill.Rev.Stat. 1981, ch. 100½, par. 2).

Accordingly, we reverse and remand the cause to the circuit court of Kendall County.

REVERSED AND REMANDED.

REINHARD and UNVERZAGT, JJ., concur.

EXHIBIT B

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
64486 Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

February 6, 1987

Mr. J. Steven Beckett
Reno, O'Bryne & Kepley
P. O. Box 693
Champaign, IL 61820

No. 64486—People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on March 2, 1987.

EXHIBIT C

No. 64486

IN THE
SUPREME COURT OF ILLINOIS

People State of Illinois,	)	
	)	
Respondent	)	Appeal
	)	Appellate Court
v.	)	Second District
	)	AC2-84-0428
Sequoia Books, Inc.,	)	TR83 CH 11
	)	
Petitioner	)	

ORDER

This matter has come for consideration upon the motion of petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expira- of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If

no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

Ben Miller
Justice, Supreme Court of Illinois

FILED

Feb 19 1987

Supreme Court Clerk

EXHIBIT D

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT E

Illinois Obscenity Statute
Ill.Rev.Stat. (1983) ch. 38, § 11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers, or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participate directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs ån obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertise or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defınal.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it

goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, education or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT F

CHAPTER 100½

NUISANCES

PUBLIC NUISANCES

Act of June 22, 1915

Act of July 5, 1957

Act of March 27, 1874

PUBLIC NUISANCES

AN ACT regarding places used for purposes of lewdness, assignation, or prostitution, to declare the same to be public nuisances, and to provide for the more effectual suppression thereof. [Approved June 22, 1915. L. 1915, p. 371.]

1. *House of assignation or prostitution public nuisance.*]. § 1. That all buildings and apartments, and all places, and the fixtures and movable contents thereof, used for purposes of lewdness, assignation, or prostitution, are hereby declared to be public nuisances, and may be abated as hereinafter provided. The owners, agents, and occupants of any such building or apartment, or of any such place shall be deemed guilty of maintaining a public nuisance, and may be enjoined as hereinafter provided.

2. *Injunction to abate—Lessee party defendant.*] § 2. The State's Attorney or any citizen of the county in which such a nuisance exists, may maintain a complaint, in the name of the People of the State of Illinois, perpetually to enjoin all persons from maintaining or permitting such nuisance, and to abate the same, and to enjoin the use of such building or apartment, or such place for any purpose, for a period of one year. Upon the filing of a verified petition therefor, in the circuit court, the court, if satisfied

that the nuisance complained of exists, shall allow a temporary writ of injunction, with bond unless the petition is filed by the State's Attorney, in such amount as the court may determine, enjoining the defendant from maintaining any such nuisance within the jurisdiction of the court issuing such a writ. No such injunction may issue, however, except on behalf of an owner or agent, unless it is made to appear to the satisfaction of the court that (1) the owner or agent of such building or apartment or of such place, knew or had been personally served with a notice signed by the petitioner; (2) such notice has been served upon such owner or such agent of such building or apartment or place at least 5 days prior thereto; (3) such building or apartment or such place, specifically describing the same, was being so used, naming the date or dates of its being so used; and (4) such owner or agent had failed to abate such nuisance, or that upon diligent inquiry such owner or agent could not be found within the United States for the service of such preliminary notice. The lessee, if any, of the building or apartment, or of the place shall be made a party defendant to such petition.

Amended by P.A. 79-1366, § 1, eff. Oct. 1, 1976.

3. *Proceedings — Evidence—Dismissal—Costs.*] § 3. The defendant shall be held to answer the allegations of the complaint as in other civil proceedings. At all hearings upon the merits, evidence of the general reputation of such building or apartment or of such place, of the inmates thereof, and of those resorting thereto, shall be admissible for the purpose of proving the existence of such nuisance. If the complaint is filed upon the relation of a citizen, the proceeding shall not be dismissed for want

of prosecution, nor upon motion of such relator, unless there is filed with such motion a sworn statement made by such relator and his attorney, setting forth the reasons therefor, and unless such dismissal is approved by the State's Attorney in writing or in open court. If the court is of the opinion that such proceeding ought not to be dismissed it may overrule such motion and may enter an order directing the State's Attorney to prosecute such cause to final determination. The cause shall be heard immediately upon issue being joined, and if the hearing is continued, the court may permit any citizen of the county consenting thereto to be substituted for the original relator. If any such complaint is filed upon the relation of a citizen, and the court finds that there was no reasonable ground or cause for filing the same, the costs may be taxed against such relator. As amended by act approved Aug. 24, 1965, L.1965, p. 3635.

4. *Plaintiff may file interrogatories—Failure to answer—Answer as evidence.*] § 4. The plaintiff at any time before, but not later than 10 days after, the filing of the answer, unless further time be granted by the court, may file interrogatories in writing concerning matters material to the allegations of the complaint or respecting the ownership of the property upon which it is claimed the nuisance is maintained. A full answer to each interrogatory under the oath of the defendant shall be filed with the clerk within 10 days after a copy of the interrogatories has been served upon him or his solicitor. For a failure to so answer interrogatories the court may strike the answer to the complaint from the files and enter an order of default and final judgment, and a rule to answer interrogatories may be entered and the court may punish a

defendant for contempt of court for a refusal to obey such rule. No person shall be excused from answering interrogatories under oath on the ground that an answer may tend to incriminate him or subject him to a penalty or forfeiture. The answer shall be evidence against, but not on behalf of, the defendant; it shall not be used against him in any criminal proceeding nor shall he be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter or thing disclosed by him in such answer responsive to the interrogatories.

Amended by P.A. 79-1366, § 1, eff. Oct. 1, 1976.

5. *Judgment of court—Sale of property—Fees, etc.*] § 5. If the existence of the nuisance is established, the court shall enter a judgment perpetually restraining all persons from maintaining or permitting such nuisance, and from using the building or apartment, or the place in wihch the same is maintained for any purpose for a period of one year thereafter, unless such judgment is sooner vacated, as provided in this Act, and perpetually restraining the defendant from maintaining any such nuisance within the jurisdiction of the court. While the judgment remains in effect, such building or apartment, or such place shall be in the custody of the court. An order of abatement shall also issue as a part of such judgment, which order shall direct the sheriff of the county to remove from such building or apartment, or such place all fixtures and movable property used in conducting or aiding or abetting such nuisance, and to sell the same in the manner provided by law for the sale of chattels under execution, and to close such building or apartment or such place against its use for any purpose, and to keep it closed for a period

of one year unless sooner released as hereinafter provided. The sheriff's fees for removing and selling the movable property shall be taxed as a part of the costs, and shall be the same as those for levying upon and selling like property under execution. For closing the building and keeping it closed the court shall allow a reasonable fee to be taxed as part of the costs. No injunction may issue against an owner, nor may an order be entered requiring that any building or apartment, or any place be closed or kept closed, if it appears that such owner and his agent have in good faith endeavored to prevent such nuisance. Nothing in this Act authorizes any relief respecting any other apartment than that in which such a nuisance exists.

Amended by P.A. 79-1366, § 1. eff. Oct. 1, 1976.

6. *Disposition of proceeds of sale of property.*] § 6. The proceeds of the sale of the movable property shall be applied in payment of the costs of the proceeding and of the abatement, and the balance, if any, shall be paid to the defendant or other person having an interest in said property.

7. *Violation of injunction.*] § 7. In case of the violation of any injunction or order of abatement issued under the provisions of this act, the court may summarily try and punish the offender for his contempt of court. The hearing may be had upon affidavits, or either party may demand the production and oral examination of witnesses. As amended by act approved Aug. 24, 1965. L.1965, p. 3635.

8. *Vacation of judgment.*] § 8. If the owner of such building or apartment, or such place appears and pays all

costs which may have been assessed, and files a bond with sureties to be approved by the clerk, in the penal sum of not less than $1,000 nor more than $5,000, conditioned that such owner will immediately abate such nuisance and prevent such a nuisance from being established or maintained therein within a period of one year thereafter, the court shall vacate its judgment, so far as the same may relate to such building or apartment, or such place, and also vacate the order directing the sale of the movable property. This release shall not release such property from any judgment, lien, penalty, or liability to which it may be otherwise subject by law.

Amended by P.A. 79-1366. § 1, eff. Oct. 1, 1976.

9. *Fine and costs lien on property.*] § 9. Whenever a fine or costs shall be assessed under the provisions of this act against the owner of any property herein declared to be a public nuisance, such fine or costs shall constitute a lien upon such property to the extent of the interest of such owner, and an order of execution shall issue thereon.

10. *Leased premises—When contract void.*] § 10. If any lessee or occupant shall use leased premises for the purpose of lewdness, assignation or prostitution, or shall permit them to be used for any of such purposes, the lease or contract for letting such premises shall, at the option of the lessor, become void, and the owner may have the like remedy to recover possession thereof as against a tenant holding over after the expiration of his term.

11. *Validity.*] § 11. If any clause, sentence, paragraph, or part of this Act is adjudged by any court of competent jurisdiction to be invalid, such judgment shall not

affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered.

Amended by P.A. 79-1366, § 1, eff. Oct. 1, 1976.

AN ACT in relation to places used for the purpose of using, keeping or selling controlled substances and cannabis. Approved July 5, 1957. L. 1957, p. 1120, eff. Jan. 1, 1958. Title amended by P.A. 77-766, § 2, eff. Aug. 16, 1971.

14. *Definitions.*] § 1. As used in this Act unless the context otherwise requires:

"Department" means the Department of Law Enforcement of the State of Illinois.

"Controlled Substances" means any substance as defined and included in the Schedule of Article II of the "Illinois Controlled Substances Act,"[1] and cannabis as defined in the "Cannabis Control Act" enacted by the 77th General Assembly.[2]

"Place" means any store, shop, warehouse, dwelling house, building, apartment or any place whatever.

"Nuisance" means any place which is resorted to for the purpose of unlawfully selling, serving, storing, keeping, giving away or using controlled substances.

"Person means any corporation, association, partner, or one or more individuals.

Amended by P.A. 77-766, § 1, eff. Aug. 16, 1971.

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[1]Chapter 56½, § 1201 et seq.

[2]Chapter 56½, § 701 et seq.

15. Selling, etc., controlled substances—Abatement.] § 2. All places and the fixtures and movable contents thereof, used for the purpose of unlawfully selling, serving, storing, keeping, giving away or using controlled substances are hereby declared to be nuisances and may be abated as hereinafter provided and the owners, agents, and occupants of and any other person using any such place may be enjoined as hereinafter provided.

Amended by P.A. 77-766, § 1, eff. Aug. 16, 1971.

16. *Anyone can file complaint for injunction—Procedure—Lessee to be party defendant.*] § 3. The Department or the State's Attorney or any citizen of the county in which a nuisance exists may maintain a complaint in the name of the People of the State of Illinois, to enjoin all persons from maintaining of permitting such nuisance, to abate the same and to enjoin the use of any such place for the period of one year.

Upon the filing of a complaint by the State's Attorney or the Department in which the complaint states that irreparable injury, loss or damage will result to the People of the State of Illinois, the court shall issue a temporary injunction without notice enjoining the maintenance of such nuisance, upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Every such temporary injunction granted without notice shall be endorsed with the date and hour of issuance, shall be entered of record, and shall expire by its terms within such time after entry, not to exceed 10 days as fixed by the court, unless the temporary

injunction, for good cause is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reason for extension shall be entered of record. In case a temporary injunction is granted without notice, the motion for a permanent injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character, and when the motion comes on for hearing, the Department or State's Attorney, as the case may be, shall proceed with the application for a permanent injunction, and, if he does not do so, the court shall dissolve the temporary injunction. On 2 days notice to the Department or State's Attorney, as the case may be, the defendant may appear and move the dissolution or modification of such temporary injunction and in that event the court shall proceed to hear and determine such motions as expeditiously as the ends of justice require.

Upon the filing of the complaint by a citizen or the Department or the State's Attorney (in cases in which the Department or State's Attorney do not request an injunction without notice) in the circuit court, the court, if satisfied that the nuisance complained of exists, shall allow a temporary writ of injunction, with bond unless the petition is filed by the Department or State's Attorney, in such amount as the court may determine, enjoining the defendant from maintaining any such nuisance within the jurisdiction of the court issuing such writ: However, no such injunction shall issue, except on behalf of an owner or agent, unless it be made to appear to the satisfaction of the court that the owner or agent of such place, knew or had been personally served with a notice signed by the petitioner and, that such notice has been served upon such

owner or such agent of such place at least 5 days prior thereto, that such place, specifically describing the same, was being so used, naming the date or dates of its being so used, and that such owner or agent had failed to abate such nuisance, or that upon diligent inquiry such owner or agent could not be found within Illinois for the service of such preliminary notice. The lessee, if any, of such place shall be made a party defendant to such petition.

In all cases in which the complaint is filed by a citizen, such complaint shall be verified.

Amended by P.A. 79-1366, § 2, eff. Oct. 1, 1976.

17. *Evidence—Hearing—Dismissal—Costs.*] § 4. The defendant shall be held to answer the allegations of the complaint as in other civil proceedings. At all hearings upon the merits, evidence of the general reputation of such place, of the inmates thereof, and of those resorting thereto, shall be admissible for the purpose of proving the existence of such nuisance. If the complaint is filed upon the relation of a citizen, the proceeding shall not be dismissed for want of prosecution, nor upon motion of such relator, unless there is filed with such motion a sworn statement made by such relator and his attorney, setting forth the reasons therefor, and unless such dismissal is approved by the State's Attorney in writing or in open court. If the court is of the opinion that such proceeding ought not to be dismissed, the court may overrule such motion and may enter an order directing the State's Attorney to prosecute such cause to final determination. The cause shall be heard immediately upon issue being joined, and if the hearing is continued the court may permit any citizen of the county consenting thereto to be substituted for

the original relator. If any such complaint is filed upon the relation of a citizen, and the court find that there was no reasonable ground or cause for filing the same, the costs may be taxed against such relator. As amended by act approved Aug. 24, 1965. L. 1965, p. 3637.

18. *Interrogatories—Refusal to answer—Contempt.*] § 5. The plaintiff at any time before, but not later than 10 days after, the filing of the answer, unless further time be granted by the court, may file interrogatories in writing concerning matters material to the allegations of the complaint or respecting the ownership of the property upon which it is claimed the nuisance is maintained. A full answer to each interrogatory under the oath of the defendant shall be filed with the clerk within 10 days after a copy of the interrogatories has been served upon him. For a failure to so answer interrogatories the court may strike the answer to the complaint from the files and enter an order of default and final judgment, and a rule to answer interrogatories may be entered and the court may punish a defendant for contempt of court for a refusal to obey such rule. No person shall be excused from answering interrogatories under oath on the ground that an answer may tend to incriminate him or subject him to a penalty or forfeiture. The answer shall be evidence against, but not on behalf of, the defendant and it shall not be used against him in any criminal proceeding nor shall he be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter or thing disclosed by him in such answer responsive to the interrogatories.

Amended by P.A. 79-1366, § 2, eff. Oct. 1, 1976.

19. *Judgment.*] § 6. If the existence of the nuisance is established, the court shall enter a judgment perpetually restraining all persons from maintaining or permitting such nuisance, and from using the place in which the same is maintained for any purpose for a period of one year thereafter, unless such judgment is sooner vacated, as hereinafter provided, and perpetually restraining the defendant from maintaining any such nuisance within the jurisdiction of the court. While the judgment remains in effect, such place shall be in the custody of the court. An order of abatement shall also issue as a part of such judgment, which order shall direct the sheriff of the county to remove from such place all fixtures and movable property used in conducting or aiding or abetting such nuisance, and to sell the same in the manner provided by law for the sale of chattels under execution, and to close such place against its use for any purpose, and to keep it closed for a period of one year unless sooner released as hereinafter provided. The sheriff's fees for removing and selling the movable property shall be taxed as a part of the costs, and shall be the same as those for levying upon and selling like property under execution. For closing the place and keeping it closed, the court shall allow a reasonable free to be taxed as part of the costs: Provided, that no injunction shall issue against an owner, nor shall an order be entered requiring that any place be closed or kept closed, if it appears that such owner and his agent have in good faith endeavored to prevent such nuisance or did not have knowledge of such nuisance except in cases in which the Department or State's Attorney states in his complaint that immediate and irreparable injury will result to the People of the State of Illinois,

then a temporary writ of injunction may issue. Nothing in this Act contained shall authorize any relief respecting any other place than that in which such nuisance exists.

Amended by P.A. 79-1366, § 2, eff. Oct. 1, 1976.

20. *Proceeds from sale of property—Disposition.*] § 7. The proceeds of the sale of the movable property shall be applied in payment of the costs of the proceeding, and the balance, if any, shall be paid to the State Treasurer for deposit in the Common School Fund of this State.

Amended by P.A. 77-766, § 1, eff. Aug. 16, 1971.

21. *Prosecution for violation of injunction or abatement order.*] § 8. In case of the violation of any injunction or order of abatement issued under the provisions of this Act, the court may summarily try and punish the offender for his contempt of court. The hearing may be had upon affidavits, or either party may demand the production and oral examination of witnesses. As amended by act approved Aug. 24, 1965. L.1965, p. 3637.

22. *Release of premises.*] § 9. If the owner of the place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances that are a lien on the place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court conditioned that he will immediately abate any such nuisance that may exist at the place and prevent it from being established or kept therein within a period of one year thereafter, the court may, if satisfied of good faith, order the place to

be delivered to the owner and the order of abatement cancelled so far as it may relate to such place.

The release of such place under the provisions of this Act does not release it from any judgment, lien, or liability to which it may be subject.

23. *Fine and costs to be lien against property.*] § 10 Whenever a fine or costs shall be assessed under the provisions of this Act against the owner of any property herein declared to be a nuisance, such fine or costs shall constitute a lien upon such property to the extent of the interest of such owner, and an order of execution shall issue thereon.

24. *Leases—Void at option of lessor.*] § 11. If any lessee or occupant shall use leased premises for the purpose of unlawful using, keeping or selling controlled substances or shall permit them to be used for any such purposes, the lease or contract for letting such premises shall, at the option of the lessor, become void, and the owner may have the like remedy to recover possession thereof as against a tenant holding over after the expiration of his term.

Amended by P.A. 77-766, § 1, eff. Aug. 16, 1971.

25. *Application of act.*] § 13. Nothing contained in this Act shall apply to any unlawful act which results from failing to comply with the provisions prescribed in the "Illinois Controlled Substances Act," enacted by the 77th General Assembly.[1]

Amended by P.A. 77-766, § 1.

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[1]Chapter 56½, § 1100 et seq.

EXHIBIT G

IN THE CIRCUIT COURT OF THE
SIXTEENTH JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	:	
Plaintiff,	:	
-vs-	:	
	:	Case No. 83-CH-11
DONALD GITTLESON, BRUCE RIEMENSCHNEIDER and CATHY RIEMENSCHNEIDER,	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

(Filed March 22, 1984)

This matter comes on to be heard on the Motion to Dismiss the Second Amended Complaint filed herein. The Court has heard the arguments of Counsel and had an opportunity to review the authorities cited by the respective parties.

With respect to Count I of the Amended Complaint in which the State seeks to enjoin the exhibition, sale, and offering for sale of the movies, video tapes or magazines described therein, the Defendant has raised several points. One of the principal arguments is that there is no showing that adequate relief cannot be obtained at law in the crim-

inal courts. Another point raised is that there is no statutory or common law cause of action providing for injunctive relief against the dissemination of allegedly obscene materials such as those described in this case. A third point is that the description of the materials involved does not comply with the legal definition of obscenity.

In the case of *City of Chicago -vs- Festival Theater Corporation*, 91 Ill.2d. 295 (1983), the Court on Page 315 does seem to acknowledge that a common law nuisance such as this may be maintained. However, the Court does point out that an injunction should not issue unless criminal prosecution is shown to be an inadequate remedy.

The only allegations contained in Count I regarding criminal prosecution are found in Paragraph 6 where it is recited that several employees of the Defendant have been charged with criminal offenses and in Paragraph 8 wherein it is stated that the criminal law has not had any limiting effect upon the practices of the Defendant's bookstore. It would appear to the Court that these allegations are inadequate to show that the criminal law has not been adequate, inasmuch as the Complaint does not recite the disposition of these charges.

A second major point raised by the Defendant is that the Complaint seeks relief which would constitute an invalid prior restraint on the Defendant's First Amendment rights. The case cited is *Vance -vs- Universal Amusement Company, Inc.*, 445 U.S. 308 (1980). A reading of that decision, which involved an injunction against allegedly obscene motion pictures, leads to a reference to the case of *Southeastern Promotions, Ltd. -vs- Conrad*, 420 U.S. 546 (1975). The reference to the *Southeastern* case was

made on Page 317 of the *Vance* opinion and had to do with the type of prior restraint which would be considered constitutionally permissible. The *Southeastern* case, which dealt with a censorship system brought into play against the proposed performing of the musical "Hair," contained a statement on Page 560 of the opinion of certain safeguards which must be found in any system of prior restraint. These safeguards are as follows:

> "*First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured."

Inasmuch as the prayer for relief contained in Count I of the Second Amended Complaint does not contemplate or include such safeguards, it would appear that the relief sought is unavailable under the law as it exists at the present time.

It would also appear that the description of the materials, the sale of which is sought to be enjoined, does not properly conform to the principles contained in *Miller -vs- California*, 413 U.S. 15 (1973).

With respect to Count II, in which the Court is asked to declare the Denmark Bookstore a public nuisance and enjoin the landlords from maintaining or permitting such nuisance for a period of one year, the Defendant raises several points in his Motion to Dismiss which merit some discussion. To some extent, the allegations of the Complaint seem to parallel the language of Chapter 100-½,

which is intended to deal with houses of prostitution, etc., which are deemed to be public nuisances. However, the only allegation contained in this Count which is remotely germane is contained in Paragraph 6 wherein it is alleged that the owners and occupants of the premises permit fellatio to take place within the building. It is not made clear whether or not this conduct is performed on a commercial basis or whether it is merely private consenting conduct between adults.

It does not, therefore, appear that an injunction would be proper based upon the allegations contained in the Complaint.

Count II also again makes reference to the nature of the materials sold in the bookstore and the lack of an adequate legal remedy. However, it would appear that the same rationale would apply with respect to this Count as to Count I.

It is therefore ordered that Defendant's Motion to Dismiss the Second Amended Complaint filed herein shall be granted.

/s/ RICHARD D. LARSON
Associate Circuit Judge

DATED this 15th day
of March, 1984.